STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF THE PROPOSED REPEAL OF REGULATION,
20.2.350 NMAC – *Greenhouse Gas Cap-and-Trade Provisions* **No. EIB 11-15(R)**

ORDER AND STATEMENT OF REASONS FOR REPEAL OF 20.2.350 NMAC

This matter came before the New Mexico Environmental Improvement Board ("Board" or "EIB") upon a petition filed by Tri-State Generation and Transmission Association, Inc. ("Tri-State"), the New Mexico Oil and Gas Association ("NMOGA"), Public Service Company of New Mexico ("PNM"), Southwestern Public Service Company ("SPS"), the Independent Petroleum Association of New Mexico ("IPANM"), the City of Farmington and the Farmington Electric Utility System ("FEUS"), and El Paso Electric Company ("EPE") (collectively, the "Petitioners") proposing the repeal of 20.2.350 NMAC - *Greenhouse Gas Cap-and-Trade Provisions* ("Part 350").

A public hearing was held in Santa Fe, New Mexico, on November 8-9, 2011, and November 15, 2011. The Board heard and received technical testimony from Petitioners and the New Mexico Environment Department ("NMED"), cross-examination from New Energy Economy, Inc. ("NEE") and Western Resource Advocates ("WRA"), and public comment from other interested persons.

On February 6, 2012, the Board, having reviewed the record and the transcript of these proceedings, including the record, transcript, findings and Statement of Reasons in EIB 10-04(R) and 10-09(R) (the 2010 proceedings that resulted in the promulgation of Part 350), deliberated and voted to repeal Parts 300, 301 and 350, unanimously, by a vote of 5 to 0.

PROCEDURAL HISTORY

A. Adoption of Part 350

1. NMAC, Title 20, Chapter 2, Part 350, was proposed by NMED in a Petition that it filed on June 4, 2010.

2. Part 350 was adopted by the Board (by a vote of 4 to 3) on November 2, 2010.

3. Part 350 took effect on January 1, 2011. 20.2.350.5 NMAC.

4. The stated objective of Part 350 is to "establish requirements for participation in a greenhouse gas emissions cap-and-trade market." 20.2.350.6 NMAC.

B. Current Proceeding

1. Petitioners filed joint Petitions for Regulatory Change for the proposed repeal of Parts 300, 301 and 350 on July 15, 2011. [1]

2. In July 20, 2011, the petition was docketed as EIB 11-15(R), as a separate proceeding from 10-04(R) (and 10-09(R) which relates to the adoption of Parts 300 and 301).

3. On July 21, 2011, NMED entered an appearance.

4. On July 29, 2011, NEE entered an appearance.

5. On August 1, 2011, the Board unanimously agreed to consider the Petition for Regulatory Changes and appointed Felicia Orth as Hearing Officer.

6. On August 1, 2011, EIB 11-17(R) was consolidated with EIB 11-15(R). Minutes, Environmental Improvement Board Meeting, Aug. 1-2, 2011 at 2-3 (as unanimously adopted with amendments on Sept. 2, 2011).

7. On August 11, 2011, the Hearing Officer issued an *Order Establishing Procedures* establishing November 8, 2011 as the date of commencement of the hearing.

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[1] The Statement of Reasons regarding the repeal of Parts 300 and 301 (EIB 11-17(R)) is a separate document.

8. On August 22, 2011, the Board published notice of the hearing in the Albuquerque Journal, 78 days in advance of the hearing. *Albuquerque Journal*, Legal Notices, Aug. 22, 2011 ("New Mexico Environmental Improvement Board Notice of Public Hearing to Consider Proposed Repeal of 20.2.300, -301 and -350 NMAC"), available at http://legals.abqjournal.com/legals/2011/8/22. *See also* NMSA 1978, §74-2-6(C) ("Notice of the hearing shall be given at least thirty days prior to the hearing date ... [and] shall be published in a newspaper of general circulation in the area affected.").

9. On August 26, 2011, Western Resource Advocates entered an appearance.

10. On August 26, 2011, the Board provided notice of its consideration of the petition to the Small Business Regulatory Advisory Commission by sending the Commission a letter advising it of the proposed repeal of Parts 300, 301 and 350 and the hearing date for the public hearing on the proposed repeal.

11. On August 31, 2011, a notice of public hearing commencing November 8, 2011, was published in the New Mexico Register. XXII N.M. Reg. No. 16 at 595 (Aug. 31, 2011).

12. On August 31, 2011, NEE filed a *Motion to Recuse Board Members Casciano, Fulfer and Peacock*; *Objections to Order Establishing Procedures and Request to Vacate or Amend*; and a *Motion That Board Members Fully Disclose Information Relating to their Possible Bias and Lack of Impartiality.*

13. On September 15, 2011, NMED (who originally proposed Parts 300, 301 350) and Petitioners filed notices of intent to present technical testimony and direct testimony in support of the petition to repeal Parts 300, 301 and 350, 54 days prior to the hearing.

14. On September 16, 2011, NMOGA filed a notice of correction of testimony.

15. At the October 3, 2011 regular Board meeting, the Board took up several motions including NEE's Motion to Recuse Board Members Casciano, Fulfer and Peacock and Motion That Board Members Fully Disclose Information Relating to their Possible Bias and Lack of Impartiality. Board Members James Casciano and Gregg Fulfer announced their recusal on the record in accordance with 20.1.1.111 NMAC.

Board Chair Deborah Peacock did not recuse herself. Board members made disclosures that they believed were relevant. *See* Transcript of October 3, 2011 meeting, Board Orders on Recusal Motions.

16. On October 24, 2011, entries of appearance were filed by League of Women Voters of New Mexico, Center of Southwest Culture, Inc. and Amigos Bravos.

17. A public hearing on the repeal petitions commenced on November 8, 2011, continued on November 9, 2011, and concluded on November 15, 2011. Although no parties besides Petitioners and NMED presented pre-filed technical testimony in this proceeding, NEE and WRA did actively and vigorously cross-examine Petitioners' and the Department's witnesses during the hearing and introduced evidence in the form of hearing exhibits.

18. During the public hearing on November 15, 2011, after soliciting input from Board Members, the Hearing Officer announced that the Board would take administrative notice of the entire record in EIB 10-04(R) and EIB 10-09(R) in the instant proceeding. EIB 11-15(R)/11-17(R) Tr. 538:21-23.

19. Closing arguments and proposed statements of reasons were filed by some of the parties on January 6, 2012.

20. On February 6, 2012, the Board met to deliberate on Part 350. The Board deliberated and voted unanimously to repeal Parts 300, 301 and 350. The five votes in favor of repeal represents a majority of a quorum as required by the Air Quality Control Act, NMSA 1978, Section 74-2-3(A) ("In taking any action under the Air Quality Control Act, a majority of the environmental improvement board constitutes a quorum, but any action, order or decision of the environmental improvement board requires the concurrence of three members present at a meeting.").

21. The repeal of Part 350 was filed with the State Records Center on February 13, 2012.

22. This Statement of Reasons dated March 9, 2012, completes the Board's action on this repeal.

STATUTORY AUTHORITY AND APPLICABLE LEGAL STANDARDS

1. Pursuant to the Environmental Improvement Act, NMSA 1978, §§ 74-1-1 to -17 (1971), the Environmental Improvement Board is empowered with promulgating rules and standards for "air quality management *as provided in the Air Quality Control Act.*" NMSA 1978, § 74-1-8(A)(4) (emphasis added).

2. According to the Air Quality Control Act ("AQCA"), the Board "shall ... adopt, promulgate, publish, amend and *repeal* regulations consistent with the Air Quality Control Act to ... prevent or abate air pollution ... " NMSA 1978, § 74-2-5(B)(1) (emphasis added).

3. The ACQA states: "Any person may recommend or propose regulations to the environmental improvement board." NMSA § 74-2-6(A). Subsection B states:

> No regulation or emission control requirement shall be adopted until after a public hearing by the environmental improvement board . . . As used in this section, "regulation" includes any amendment *or repeal thereof.*

NMSA 1978, § 74-2-6(B) (emphasis added).

4. The Board's rulemaking procedures define a "regulatory change" as the "adoption, amendment or *repeal* of a regulation." 20.1.1.7(P) NMAC (emphasis added).

5. Pursuant to 20.1.1.300(A) NMAC, "[a]ny person may file a petition with the board to adopt, amend or repeal any regulation within the jurisdiction of the board." (emphasis added).

6. New Mexico case law establishes that agency consideration of a regulatory repeal must be adequately noticed and supported by evidence in the record. *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n (In re Rates and Charges of Mountain States Tel. & Tel. Co.),* 104 N.M. 36, 41-42, 715 P.2d 1332, 1337-38 (1986); *see also Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n,* 115 N.M. 678, 680-81, 858 P.2d 54, 56-57 (1993).

7. Pursuant to Section 74-2-9(C)(2) of the AQCA, the Board's decision must be supported by substantial evidence. Substantial evidence is evidence that a reasonable mind would recognize as adequate to support the conclusions reached by a

fact-finder. Wagner v. AGW Consultants, 2005-NMAC-016, ¶85, 137 N.M. 734, 114 P.3d 1050; *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶17, 125 N.M. 401, 962 P.2d 1236.

8. Pursuant to NMSA 1978, Section 74-2-5(E):

> In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:
>
> (1) character and degree of injury to or interference with health, welfare, visibility and property;
>
> (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and
>
> (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

NO BIAS AND NO EX PARTE COMMUNICATIONS

Each of the individual Board members who participated in the 11-15(R)/11-17(R) proceedings stated on the record that he or she could be fair and impartial. However, NEE has made allegations of bias against the entire Board and the individual members of the Board, and allegations of *ex parte* communications by the Board.

1. <u>The Members of the Board Were Not Biased</u>

NEE stated throughout the proceedings that there was bias by individual members of the Board and the entire Board because they were appointed by Governor Susana Martinez, who has openly stated her opposition to Part 350. However, all members of the Board are appointed by the incumbent Governor and this, in itself, does not demonstrate, suggest or prove bias.[2] We note that the Board is composed of both Democrats and Republicans by statutory requirement of the New Mexico Legislature. 71-1-4(A) NMSA 1978.

[2] If this were true, members of the Board appointed under Governor Bill Richardson would also have to be presumed bias based on the mere fact that they were appointed by him.

All Board members have a duty and obligation to be fair and impartial if they participate in any proceeding under the EIB rules. 20.1.1.111 NMAC states:

> No board member shall participate in any action in which his or her impartiality of fairness may reasonably be questioned, and the member shall recuse himself or herself in any such action by giving notice to the board and the general public by announcing this recusal on the record.

During the October 3, 2011 Board meeting regarding concerns of bias, each Board member was questioned about whether he or she could not be impartial or fair and therefore should be recused. Members James Casciano and Gregg Fulfer recused themselves and announced their recusals on the record. The other Board members, Jeffrey Bryce, Timothy Morrow, Deborah Peacock and Elizabeth Ryan, each addressed the issue and indicated that they could be fair and impartial. *See* Transcript of October 3, 2011 meeting; *see also* the Board's *Order* denying *Motion that Board Members Fully Disclose Their Possible Bias and Lack of Impartiality* (setting forth specific discussion from each Board Member why each was not biased).

2. The Chair and the Board Did Not Engage in Alleged *Ex Parte* Communications

On August 31, 2011, NEE brought a motion to recuse Board Member Peacock, alleging bias. NEE argued that Ms. Peacock "engaged in *ex parte* communications with the petitioners on the matters now pending before the EIB." NEE's allegations refer to the Court of Appeals ordered mediation regarding seventeen appeals filed by the same parties as Petitioners in the Court of Appeals. This mediation was ordered by the Court of Appeals (Order No. 01-42).[3]

[3] There are seventeen appeals currently before the Court of Appeals regarding EIB 10-04(R) and EIB 10-09(R), namely Court of Appeals No. 30,897; 30,898; 30,899; 30,901; 30,902; 30,907; 30,908; 30,952; 30,953; 30,954; 31,015; 31,016; 31,017; 31,018; 31,019; 31,020; and 31,021.

A. The Court of Appeals Ordered the Board to Participate in the Mediation.

Pursuant to the Court Order to attend mediation, the Board elected to send, as its appropriate Board representative, Chair Deborah Peacock to the mediation, along with the Board's counsel. Mediation was welcomed by the Board who believed it would be in the public interest to attempt to resolve or dismiss seventeen separate appeals filed at the Court of Appeals.

On June 17, 2011, Chair Deborah Peacock participated in the mediation, in her role as Chair of the EIB, together with all of the parties to the appeals. At that time, the Court of Appeals had determined that NEE and Amigos Bravos, who had filed motions to intervene, were not entitled to intervene in the appeals.[4] Therefore, because NEE and Amigos Bravos were not at the time of the mediation parties to the appeals, they were not appropriate entities to include in the mediation, were not in the Court's Order to attend mediation, and thus they did not participate in the mediation. Likewise, the New Mexico Environment Department (who would be affected by Part 350), was also not a party to the appeals, and therefore did not participate in the mediation.

B. There Were No *Ex Parte* Communications Between the Board and the Parties.

Regarding this Court-ordered mediation, NEE alleges that the discussions during the mediation were *ex parte*, presumably because NEE was not involved in the mediation. The term "*ex parte* communications", in general, means that communications are held between one or more parties without all of the other parties present in the presence of the decision maker, which in these appeals is the Court of Appeals Judges.

In this case, all of the parties to the appeals at that time were present at the Court of Appeals mediation. At no time were there any communications with Chair

[4] Their motions to intervene were denied by the Court of Appeals in May of 2011.

Peacock when all parties were not present.[5] Moreover, the Court-ordered mediation was held at the Court of Appeals with the Court of Appeals in-house mediator, Robert Rambo, present at all times and held pursuant to his instruction, facilitation, and sole supervision. Mr. Rambo supervised and facilitated the mediation among all of the parties to the appeals.

In summary, and by the very definition of *ex parte* communication, mere participation by Chair Peacock at the Court-ordered mediation, along with all other parties to the appeals, no *ex parte* communications occurred by the Chair or the Board.

C. Appeals Are Separate Proceedings and Merits Were Not Discussed.

In addition to the Board duties to avoid general *ex parte* communications, the Board is instructed under its own Rule 20.1.1.112 NMAC, prohibiting "ex parte discussions." That Rule states:

> At no time after the initiation and before the conclusion of a proceeding under this part, shall the department, or any other party, interested participant or their representatives discuss ex parte the merits of the proceeding with any board member or the hearing officer.

This Rule prohibits *ex parte* communications between board members with parties who appear before the board during a pending proceeding. This rule is limited to a specific time frame in which such discussions are prohibited ("after the initiation and before the conclusion of a proceeding").

This Rule, however, is limited in two regards. First, the Rule is limited to a specific time frame in which such discussions are prohibited ("after the initiation and before the conclusion of a proceeding"). Second, this Rule is limited in that the prohibited act is discussing "the merits of the proceeding."

[5] The Chair additionally stated on the record that "[she] has never engaged in any *ex parte* communications and never discussed any outcome in this matter." *See* Transcript of October 3, 2011 meeting and Board's Order.

i. The Timeline Demonstrates That These Were Separate Proceedings.

NEE argues that the repeal proceedings in EIB 11-15(R)/11-17(R) are not separate from and are combined with the proceedings which are the subject of the appeals stemming from EIB 10-04(R)/10-09(R) regarding the adoption of Rules 300, 301 and 350. It makes this argument in an attempt to bolster its claim that there were *ex parte* communications during the Court of Appeals ordered mediation, presumably using the following logic: If the two matters (adoption and repeal proceedings) are one and the same proceeding, then the proceeding has already been "initiated" pursuant to NMAC 20.1.1.112, and therefore *ex parte* communications may have occurred during the prohibited time period ("after the initiation and before the conclusion of a proceeding").

Notably, NEE admits that the repeal proceedings are separate proceedings from the rule adoption proceedings. At the Oral Arguments before the Supreme Court regarding the appeals for Rule 100, *New Energy Economy, Inc. v. Vanzi*, No. 33,074, Mr. Bruce Frederick, attorney for NEE, acknowledged that the repeal proceedings were separate proceedings from the appeals regarding the adoption of the rules.[6] Specifically, Chief Justice Daniels asked the following questions to NEE's counsel and received the following responses:

> CHIEF JUSTICE DANIELS: Well, let me ask you this: Wouldn't the EIB have the right to just start a new rule proceeding? Which seems like what they've done.
>
> MR. FREDERICK: PNM can petition the Board. Any other person can petition the Board to start a new rule proceeding anytime.
>
> CHIEF JUSTICE DANIELS: That's what they've done, isn't it?
>
> MR. FREDERICK: That is exactly what they've done. New Energy Economy could file another petition. That's a separate case.

[6]The Supreme Court Case cited is directed to the adoption of Rule 100 (EIB 08-09(R)), regarding greenhouse gas emissions reductions (also the subject of repeal proceedings currently before the Board), in which NEE was the petitioner for the Rule.

Transcript of Oral Argument, Supreme Court, at 4:3-17, New Energy Economy, Inc. v. Vanzi (July 27, 2011) (No. 33,074) (emphasis added); EIB 11-15(R)/11-17(R) Oct. 3, 2011 Tr. at 18:11-24.

The Supreme Court subsequently ruled that the repeal proceedings are separate proceedings from the matters on appeal. *See New Energy Economy, Inc. v. Vanzi*, No. 33,074, slip op. at ¶ 10 (N.M. Sup. Ct. Feb. 16, 2012). Based on this decision, EIB did not reopen the original administrative hearing on Rule 100 but rather, Petitioners filed a new petition with the EIB, essentially taking the role of petitioners in a new rule-making proceeding in accordance with the Supreme Court's decision.

Regarding the timeline set forth in 20.1.1.112 NMAC ("after the initiation and before the conclusion of a proceeding"), because the repeal proceedings and adoption proceedings of a rule are considered separate proceedings, we note that the Court-ordered mediation occurred before the initiation of repeal proceedings in 11-15(R)/11-17(R). The mediation regarding the appeals (concerning EIB 10-04(R) and EIB 10-09(R)) occurred on June 17, 2011. Petitioners filed their petition(s) for EIB 11-15(R)/11-17(R), new and separate proceedings, on July 15, 2011, after the mediation.

Thus, the repeal proceedings, EIB 11-15(R)/11-17(R), involve new and separate proceeding from the adoption proceedings under appeal (EIB 10-04(R) and EIB 10-09(R)). Accordingly, there could not have been any *ex parte* communications at the mediation (conducted in June 2011) prior to the repeal petitions filed in July 2011.

ii. There Was No Discussions of the Merits

In addition, 20.1.1.112 NMAC prohibits discussions of the "merits" of the proceedings. Chair Peacock and the Board's counsel did not discuss the merits of the proceeding with any participants during the mediation. At both the mediation and at the Board meetings prior to initiation of the current proceeding in EIB 11-15(R)/11-17(R), the Board also never discussed the merits of the proceeding and, moreover, no settlement was ever reached.

We specifically note that the Chair had no authority to make any decisions on behalf of the Board at the mediation. All substantive decisions of the Board are required to be made in public meetings with a quorum of the Board present.

Likewise, at the mediation, and prior to initiation of the proceedings in EIB 11-15(R)/11-17(R), the Chair and the Board: (1) did not know whether any proceedings would be filed; or (2) who would file the proceedings; or (3) what would be the nature of any such proceedings, if filed (e.g. repeal or amendment or new proposed rules). Likewise, at the mediation, and prior to initiation of the proceedings in EIB 11-15(R)/11-17(R), the Chair and the Board: (1) did not agree to entertain any particular petition regarding Part 350; (2) did not agree to repeal Part 350; and (3) did not agree to any outcome regarding Part 350. Only after petitions to repeal were filed and the Board held a hearing to consider whether or not to hear the petitions, did the Board agree to hear the petitions for repeal of Rules 300, 301, and 350. Not until the hearings and deliberations took place in EIB 11-15(R)/EIB 11-17(R), were merits considered and discussed by the Board, in open and public meetings, where all parties were present.

In summary, Chair Peacock, appropriately, did not recuse herself from the proceedings. She did not engage in any *ex parte* communications and certified, on the record, that she could be fair and impartial. Likewise, the Board, and its actions in participating in the Court-ordered mediation, did not engage in *ex parte* communications or exhibit bias; it was in the public interest for the Board to participate in mediation. The Board maintains that each of the members who participated in the proceedings are fair and impartial, are open-minded during all proceedings before the Board, and do not take direction from the Governor.

FINDINGS OF THE BOARD AND STATEMENT OF REASONS

Pursuant to 20.1.1.406(E) NMAC the Board issues the following finding of facts and Statement of Reasons:

The Board has fully considered the criteria set forth in NMSA 1978, Section 74-2-5(E) and has concluded that substantial evidence warrants repeal of Part 350. In repealing Part 350, the Board does not disregard the facts and circumstances it relied

upon in 2010 when it adopted Part 350. In considering the petition, the Board has carefully considered the record in EIB 10-04(R) and EIB 10-09(R) including the Statement of Reasons the Board adopted in November 2010 in support of Part 350. The Board has also carefully considered the evidence presented in this proceeding in support of and in opposition to the repeal of Part 350. The Board has considered and weighed all of the evidence in the record. Citations to specific portions of the record in this Statement of Reasons are only intended to be illustrative of this evidence.

The Board hereby makes the following findings. These findings are organized in accordance with the order of categories that the Board is required to consider as set out in NMSA 1978 § 74-2-5(E), and are not intended to reflect the order of significance the Board ascribes to each of these reasons. These findings also include consideration of changes which have occurred and/or new substantial evidence received since this Board adopted Part 350.

A. STATUTORY REQUIREMENTS

The Board extensively considered the statutory requirements of NMSA § 74-2-5(E).

NMSA § 74-2-5(E) states:

> In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:
>
> (1) character and degree of injury to or interference with health, welfare, visibility and property;
>
> (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and
>
> (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.
>
> Each of the three parts of NMSA § 74-2-5(E) is discussed below.

(1) CHARACTER AND DEGREE OF INJURY TO OR INTERFERENCE WITH HEALTH, WELFARE, VISIBILITY AND PROPERTY

NMSA § 74-2-5(E)(1) requires that the Board consider the "character and degree of injury to or interference with health, welfare, visibility and property". The Board makes the following findings:

(A) Zero Impact of Part 350 on Human Health and the Environment—No Environmental Impact

1. Compelling evidence showed that greenhouse gases mix uniformly in the atmosphere; a ton of greenhouse gas has the same impact no matter where it is emitted. EIB 11-15(R)/11-17(R) PL 35 - Tongate Direct at 5:3-17 (citing 2010 testimony of Adam Rose; IPCC Fourth Assessment Report (2007)).

2. The evidence also provided that New Mexico's greenhouse gas emissions scarcely register in the context of national and international emissions. EIB 11-15(R)/11-17(R) PL 36 - Ihle Direct at 5:14-15; EIB 11-15(R)/11-17(R) PL 39 - Christy Direct at 5:26 to 6:6.

3. In fact, Part 350 applies to less than half of one percent of total gross greenhouse gas emissions in the United States, and a much smaller percentage of global emissions. EIB 11-15(R)/11-17(R) PL 36 - Ihle Direct at 5:1-13; EIB 11-15(R)/11-17(R) PL 36 - Themig Direct at 20:17-18; EIB 11-15(R)/11-17(R) PL 39 - Christy Direct at 6:3-4; EIB 10-04(R) Tr. 1234:19-25, 1235:1 (Norton); EIB 10-04(R) PL 36 - Wehrum Direct at 21:1-11. Of that amount, the total reduction required by the rule is infinitesimal, representing only a tiny fraction of the total greenhouse gas emissions of the United States. EIB 10-04(R) PL 36 - Wehrum Direct at 21:8-10, 22, Chart I. 11.

4. The impact of Part 350 on worldwide carbon dioxide emissions would be less than 0.003 percent. EIB 11-15(R)/11-17(R) PL 36 - Themig Direct at 21:1-3. Therefore, any increase or decrease in the state's emissions will have no perceptible impact on climate change or global warming.

5. Testimony given from Mr. Jack Ihle, Manager of Environmental Policy for Xcel Energy, witness on behalf of PNM, Mr. Patrick J. Themig, PNM's Vice President of Generation, witness on behalf of PNM, Mr. Butch Tongate, Deputy Secretary of the New

Mexico Environment Department, witness on behalf of NMED, Dr. John R. Christy, Professor of Atmospheric Science and Director of the Earth System Science Center, witness on behalf of Tri-State, and Mr. Jeffrey R. Holmstead, Esq., Partner, Bracewell & Giuliani LLP, witness on behalf of Tri-State, provides that because New Mexico is such a small contributor to overall greenhouse gas emissions, any decrease in the state's emissions that may result from Part 350 will have no perceptible impacts on climate change, in New Mexico or anywhere else. EIB 11-15(R)/11-17(R) PL 36 - Ihle Direct at 6:15-17; EIB 11-15(R)/11-17(R) Tr. 515:1-4 (Themig); EIB 11-15(R)/11-17(R) Tr. 39:1-3 (Tongate); EIB 11-15(R)/11-17(R) PL 35 - Tongate Direct at 6:6-8; EIB 11-15(R)/11-17(R) PL 39 - Christy at 2:23-26, 5:25-26, 6:16-18; EIB 11-15(R)/11-17(R) Tr. 634:12-15; 649:2-6 (Christy); EIB 11-15(R)/11-17(R) Tr. 437:17-24 (Holmstead); EIB 11-15(R)/11-17(R) PL 36 - Themig Direct at 5:1-2, 20:10 to 21:4; EIB 11-15(R)/11-17(R) PL 36 - Bothwell Direct at 5:3-7; EIB 11-15(R)/11-17(R) PL 36 - Ihle Direct at 2:19 - 3:1, 5:1-15, 6:15-22. Even shutting down all economic activity in the state or applying the rule to the entire nation would not create a noticeable impact on climate change. EIB 11-15(R)/11-17(R) PL 39 - Christy at 6:16-18; EIB 11-15(R)/11-17(R) Tr. 437:17-24 (Holmstead); EIB 11-15(R)/11-17(R) Tr. 649:12-16, Tr. 829:5-15 (Christy).

6. Notably, even the petitioner in the 2010 proceedings before the Board to adopt Part 350, stated in the context of the 2010 proceeding that the rule "will not, on its own, stop global warming or even have a discernible effect on rising temperatures in New Mexico." EIB 10-04(R) PL 18 - Norton Direct at 17:20-21. The 2010 petitioner further acknowledged that the rule, standing alone, "is not likely to reverse the impacts of climate change in New Mexico." *Id.* at 19:13; *see also* EIB 10-04(R) PL 18 - Ely Direct at 5:16-17 (rule "will not stop global warming or even have a discernible effect on temperatures in New Mexico").

7. Evidence and arguments were presented both in 2010 and 2011 that Part 350 would not "prevent or abate air pollution" as required of a regulation promulgated under the AQCA. EIB 10-04(R) PL 36 - Wehrum Direct at 24:10-13; EIB 11-15(R)/11-17(R) PL 39 - Holmstead Direct at 2:32-33; EIB 10-04(R) PL 90 - Tri-State Closing Argument at 1-2, 6, 30-34; EIB 11-15(R)/11-17(R) PL 35 - Tongate at 4:16-18.

8. Evidence was presented in 2010 that the rule would not have any measurable impact on climate change, EIB 10-04(R) PL 36 - Christy at 12, 11.27-29 ("the impact of the legislative action being considered today, even if adhered to by the entire nation, will have essentially no measurable impact on the climate system"); Tr. 437:11-24 (Holmstead).

9. Because the quantity of greenhouse gas emission reductions the rule would achieve is minuscule compared to the total quantity of global greenhouse gas emissions, the Board finds that Part 350 cannot impact climate change or result in any meaningful reductions of greenhouse gas emissions in New Mexico. EIB 11-15(R)/11-17(R) Tr. 39:1-3 (Tongate); EIB 11-15(R)/11-17(R) PL 35 - Tongate Direct at 6:6-8; EIB 11-15(R)/11-17(R) PL 39 - Christy Direct at 2:23-26, 5:25-26, 6:16-18; EIB 11-15(R)/11-17(R) Tr. 647:1-9, 789:2-4 (Christy); EIB 11-15(R)/11-17(R) Tr. 437:17-22 (Holmstead); EIB 11-15(R)/11-17(R) PL 36 - Themig Direct at 5:1-2, 20:10 to 21:4; EIB 11-15(R)/11-17(R) PL 36 - Bothwell Direct at 5:3-7; EIB 11-15(R)/11-17(R) PL 36 – Ihle Direct at 2:19 to 3:1, 5:1-15, 6:15-22; EIB 11-15(R)/11-17(R) PL 36 - Forrister Direct at 9:13-15.

10. Assuming that climate change is a problem that must be addressed by policymakers through the regulation of anthropogenic greenhouse gas emissions, the Board's task was to consider whether Part 350 would mitigate that environmental problem. Upon careful review of this testimony, and of other testimony presented to the Board in 2010 and 2011, the Board cannot say that it would. In fact, in 2010 and 2011, a prominent scientist who serves on the Intergovernmental Panel on Climate Change testified that the rule would not have an effect on climate change. EIB 11-15(R)/11-17(R) PL 39 - Christy Direct at 6:16-33; EIB 10-04(R) PL36 - Christy Direct at 12:27-29. The Department's scientific expert would not address the question. EIB 10-04(R) Tr. 117:25 to 120:5 (Gutzler).

11. From a thorough analysis of the record in both the 2010 and 2011 proceedings, the Board finds that there exists considerable doubt and uncertainty on whether global warming is being caused by man and therefore whether man can control it. Dr. David S. Gutzler, Climate Scientist and Professor at the University of New Mexico, witness on behalf of NMED in EIB 10-04(R), testified that "[w]e know how the

greenhouse effect works, we know that greenhouse gases are increasing, we see the climate warming up." EIB 10-04(R) Tr. 54:16-18 (Gutzler). Beyond that statement in the record, there is no scientific consensus.

12. For example, Dr. Christy testified that:

> Human understanding of the climate system and the phenomenon of climate change are in a constant state of flux. Scientific inquiry has largely resolved certain issues, such as the role of carbon dioxide ("CO2") and anthropogenic emissions of greenhouse gases ("GHG") as climate forcers, *i.e.*, that in a simple system increases in these constituents act to warm the climate slightly. Other issues, however, such as the magnitude of future climate changes, which depends on many other climate parameters, and the secondary effects that such changes might have on human health and ecosystem welfare, remain subject to considerable uncertainties or have been almost entirely neglected in the scientific literature. Indeed, in many respects, climate change science remains in its infancy and demands further study before policymakers should consider projections of future climate change impacts sufficient to guide regulatory or other responsive action. Without such advances in our understanding, it will be unknown or even detrimental as to the effect and extent that such regulations might impact upon the climate specifically and society generally. On the other hand, what is known is that New Mexico's current climate variations cannot be attributable to human-induced climate change with any level of confidence . . . The latest adjusted NOAA data confirms that New Mexico's climate is within the range of natural variability.

EIB 11-15(R)/11-17(R) PL39 - Christy Direct at 2.

13. In addition to the direct statements of Drs. Christy and Gutzler, the Board considered a number of peer-reviewed and published scientific journal articles which were presented in the records of both the 2010 and 2011 proceedings. Some articles stated global warming was occurring because CO2 concentrations are increasing. On the other hand, a number of other peer-reviewed and published scientific journal articles stated otherwise. The Board finds that the record shows that leading climate scientists cannot agree whether man-made greenhouse gas emissions cause global warming.

14. In fact, compelling evidence revealed that Part 350 may be counterproductive on the environment. Mr. Michael Sims, P.E., Control Director of FEUS Generation and System, witness on behalf of COF and FEUS, testified:

> If we're required to reduce our output at our facilities X number percent per year, and it is more economically feasible for us to buy coal-fired generation from a power plant in Arizona, what we have done is for every megawatt we have reduced with our very efficient natural gas-fired generation in New Mexico, we're now buying very inefficient, more greenhouse gas intensive generation from someone else, and we've actually increased the amount of greenhouse gas emissions going into the atmosphere.

EIB 11-15(R)/11-17(R) Tr. 263:16-25 (Sims).

15. Moreover, Mr. Bruce A. Gantner, P.E., Environmental Supervisor at ConocoPhillips Co., witness on behalf of NMOGA, testified:

> [O]ne must assess the equivalent [greenhouse gas] emissions produced by the electrical generation method for the same horsepower being utilized. According to the Energy Information Administration, a bituminous coal-fired power plant generated approximately 205 pounds of [carbon dioxide] per million British Thermal Units (BTUs). And that equates to 3.06 [tons per year] of carbon dioxide per 1,000 watts of electricity. Given [that] approximately 750 watts per horsepower, this means that a 100 [horsepower] engine would emit the equivalent of 229.9 [tons per year] of [carbon dioxide] . . . Review of the EPA AP-42 document for emission factors, a natural gas fired [reciprocating internal combustion engine], 4 stroke lean burn engine would emit 110 [pounds] of [carbon dioxide] per million BTU. That means that the same 100 [horsepower] engine for a natural gas fired reciprocating internal combustion engine would emit 123.4 tons of [carbon dioxide] per year. Hence, greenhouse gas emissions would nearly double if an electric motor supplied by electricity generated by a coal-fired power plant were employed in lieu of a natural gas fired [engine].

EIB 11-15(R)/11-17(R) PL41 - Ganter Direct at 20:9-19.

16. Furthermore, Maude Grantham-Richards, FEUS Electric Utility Director, witness on behalf of COF and FEUS, testified:

> Due to the former EIB's adopt[ion of] Rule 350 and its Rule 100 . . . that were approved in 2010, we have removed from our capital improvement plan the construction of any generation facilities. Our plan was to site a gas-fired combined cycle unit similar to our Bluffview plant, a sister unit, at the Bluffview location with an anticipated on line date of 2013. This would have alleviated the need to make power purchases with our customers' dollars going to out of state electric utilities and in addition would have saved the customers money: internal generation being less costly than external purchases. Due to the adopted GHG Rules 350 and 100, the Farmington electric utility has delayed its plans for construction of any generation capacity.

EIB 11-15(R)/11-17(R) PL38 - Richards Direct at 2.

17. Mr. Darren Smith, Manager of EHS with Devon Energy Corp., witness on behalf of NMOGA, stated that "last year . . . Devon considered the construction of a compressor facility in [Southeastern New Mexico] to help us manage the pipeline capacity problem in this region. The risk of [greenhouse gas] regulation and the cost that would be incurred to reduce emissions 2% year over a year was one of the contributors to the decision not to go forward with this project." EIB 11-15(R)/11-17(R) PL41 – D. Smith Direct at 4:8-11.

18. Proponents of Part 350 state that Part 350 has a small but significant effect on climate change. The Board finds that the weight of the evidence showed, that Proposed Part 350 will not stop global warming or even have a discernible effect on temperatures in New Mexico. EIB 11-15(R)/11-17(R) Tr. 829:2-15 (Christy).

19. Moreover, Part 350 does not require any emission reductions from sources within the Board's jurisdiction because those sources can comply with the rule by purchasing allowances and offsets from other states and provinces rather than reducing their own emissions. EIB 11-15(R)/11-17(R) PL 39 - A. Smith at 20:16-19. Although the rule is designed to impose an aggregate cap on statewide greenhouse gas emissions from certain sources, because compliance obligations cannot take effect without the participation of at least one other U.S. jurisdiction with which New Mexico

would trade its allowances, *see* 20.2.350.300(D) NMAC, the rule does not provide any guaranteed emission reductions in New Mexico, or in tum any environmental or human health benefit.

20. Allowances and offset credits under Part 350 do not need to come from New Mexico; rather, they may be obtained from any jurisdiction in the Western Climate Initiative that has been recognized by New Mexico. 20.2.350.7(B), (P) NMAC. As a result, all sources in New Mexico could be in full compliance with the rule even if each substantially increased its emissions every year.

21. In 2010, the Board notes that the Department presented testimony that it would take an allowance price of $100 to convince New Mexico entities to reduce their own emissions rather than importing allowances from other states. EIB 10-04(R) PL 18 - Rose at 20:2-4; *see also* EIB 10-04(R) PL 18 - Rose at 19:5-9 ("the more cost-effective way for New Mexico sources to meet their compliance obligations would be to purchase emission allowances from other jurisdictions in the [Western Climate Initiative] trading system. Therefore, while the regional emission reduction target would be met, the state emission reduction target would not under any of the seven policy cases."). \

22. While Part 350 appears to envision offsets (Part 350.7(P)), offset credits (Part 350.208), and purchase of allowances (Part 350.7(B)) to satisfy the 2% annual reduction requirement in Subpart 350.11 and the surrender of compliance instruments in 350.301, these are some of the vague portions of Part 350. For example, 350.208 describes that no "offset credit" shall be allowed to meet a compliance obligation unless the offset credit represents a "reduction, avoidance or sequestration that is real, additional, quantifiable, permanent, verifiable and enforceable." However, it does not define specifically what "will be allowed" or "if sufficient offset credits even exist" to meet Part 350. EIB 11-15(R)/11-17(R) PL38 – Sims Direct at 14. And, according to NMED in the 2010 proceedings, the Department will not certify offsets—some external jurisdiction will be left that task. EIB 10-04 (R) Tr. 1680:10 to 1684:25 (Weaver).

23. The Board references a few of the public comments given during the 2011 hearings alleging that the public's increase in asthma illnesses and wild fires in this

State was somehow due to climate change.[7] However, no technical evidence was submitted to the Board reflecting any medical or scientific opinions, research, or other evidence which provided any correlation or causal connection between asthma related illnesses and wildfires on the one the hand and climate change on the other. The Board is concerned about the health of New Mexicans. However, because the evidence presented reflected absolutely zero causal connection between the matters, the Board finds that greenhouse gas emissions from New Mexico sources do not themselves cause harm to human health or the environment and do not unreasonably interfere with the public welfare, visibility, or the reasonable use of property.

24. A regulation promulgated under the AQCA must be shown to "prevent or abate air pollution" in New Mexico. Given the lack of evidence presented in 2010 and 2011 that the rule would prevent or abate air pollution within the area of the Board's jurisdiction as required under the Air Quality Control Act the Board concludes that this rule would have no measurable environmental benefit, and therefore, it will not have any discernible benefit to human health and welfare, visibility or property in the State of New Mexico.

(2) THE PUBLIC INTEREST, INCLUDING THE SOCIAL AND ECONOMIC VALUE OF THE SOURCES AND SUBJECTS OF AIR CONTAMINANTS.

NMSA § 74-2-5(E)(2) requires that the Board consider the "the public interest, including the social and economic value of the sources and subjects of air contaminants." The Board makes the following findings:

1. The Board concludes that Part 350 is not in the public interest and is not good policy because the economic costs of Part 350 outweigh its environmental benefit.

2. Compelling evidence showed that individual companies and their customers will incur significant costs in order to comply with Part 350. By its very

[7] *See e.g.* Emailed letter under New Public Comment for GHG/15, 16 and 17 available at: ftp://ftp.nmenv.state.nm.us/www/EIB/New%20material%20for%20GHG/15%2016%20and%2017%20new%20public%20comment/Emailed%20letters/Public%20Comment%20part%203.pdf.

nature, Part 350 would increase electricity costs in New Mexico, which will be paid by New Mexico residential and commercial customers. EIB 11-15(R)/11-17(R) PL 36 - Sheesley Direct at 9:12-15.

3. Ms. Cynthia Bothwell, PNM's Director, Planning and Resources, witness on behalf of PNM, testified that the rule would result in a system cost penalty to PNM customers of $841 million (2011 net present value) between 2012 and 2030, an estimated equivalent of about $97 million in higher ratepayer costs in 2020. EIB 11-15(R)/11-17(R) PL 36 - Bothwell Direct at 7:21 to 8:12.

4. An SPS representative, Mr. Jack Ihle, Manager of Environmental Policy for Xcel Energy, witness on behalf of PNM, testified that expenditures on allowances would cost SPS customers in New Mexico about $28 million per year, assuming an allowance price of $20/metric ton. EIB 11-15(R)/11-17(R) PL 36 - Ihle Direct at 8:1-14. SPS's New Mexico rates are anticipated to increase by 9% to 10% in the 2013 to 2014 timeframe as a result of the rule. *Id.*

5. Ms. Barbara A. Walz, Senior Vice President, Policy and Environmental, Tri-State Generation and Transmission Association, Inc., witness on behalf of Tri-State, testified that Part 350 would impose significant costs on its member-systems, given that cooperatives pass on all costs to members. Because Tri-State's member cooperatives in New Mexico have average household and per capita incomes about 20 percent lower than state averages and 40 percent lower than national averages, Tri-State's members would be uniquely and significantly impacted by the rule. EIB 11-15(R)/11-17(R) PL 39 - Walz at 4:43 to 5:15. The Board concludes that New Mexicans in these regions cannot afford the cap and trade program.

6. A Farmington representative, Mr. Kapplemann, also testified in 2010 that because of the rule, FEUS's generation costs were projected to increase up to $8.1 million annually by 2010 (with cumulative costs of $32.5 million through 2020) translated into a 8.22% rate increase to FEUS's customers by 2020, and between a 13.4% and 30.1% rate increase by 2030. EIB 10-04(R) Farmington Exhibits 1 and 2 (Kapplemann). EIB 10-04(R) Tr. 1992:19-1997:6 (Kappleman).

7. A NMOGA witness estimated that the cumulative cost of compliance with Part 350 to the New Mexico refining industry through 2020 will be $26.1 million. PL 41 - Price at Exhibit A. Exhibit 13. Similar Costs of compliance will occur throughout the oil and gas industry. EIB 11-15(R)/11-17(R) PL 41 - D. Smith Direct at 3:3 to 4:23; EIB 11-15(R)/11-17(R) PL 41 - Knowlton Direct at 15:5-15. Testimony from Mr. Darren Smith's showed that this additional cost places a burden on the oil and gas industry that will result in reduced production, less expansion in New Mexico, reduced investment, lost jobs, and leakage. EIB 11-15(R)/11-17(R) PL 41 - D. Smith at 3:3 – 4:23, Exhibit A, 12:11 to 14:23; EIB 11-15(R)/11-17(R) PL 41 - Price at Exhibit A, 23:16 to 24:20; Henke Statement at 2:12 to 6:25.

8. Testimony at the hearing also provided that no neighboring states are adopting similar regulations, and therefore, Part 350 will put New Mexico businesses at an economic disadvantage. EIB 11-15(R)/11-17(R) PL 36 – Sheesley Direct at 10:1-7; EIB 11-15(R)/11-17(R) Tr. 207:21-24 (Sheesley). The rule will also put New Mexico at a disadvantage in attracting new businesses to the state. EIB 11-15(R)/11-17(R) PL 36 - Sheesley at 12:5-9; EIB 11-15(R)/11-17(R) Tr. 37:23 to 38:4 (Tongate); EIB 11-15(R)/11-17(R) Tr. 207:24 to 208:1 (Sheesley).

9. The analyses presented by the testimony of Dr. Anne E. Smith, Senior Vice President, NERA Economic Consulting, witness on behalf of Tri-State, COF and FEUS, EPEC and Mr. Timothy J. Sheesley, Chief Economist for Xcel Energy, witness on behalf of PNM, are consistent with national analyses of cap-and-trade programs. Their testimonies, for example, stated that a Department of Energy, Energy Information Administration 2010 analysis of the Kerry-Lieberman American Power Act greenhouse gas cap-and-trade proposal showed Gross Domestic Product impacts of between zero and -0.7% by 2020 and between -0.4% and -l.8% by 2035 and stated that the proposed bill would increase the costs of using energy, which reduces real economic output, reduces purchasing power, and lowers aggregate demand for goods and services. EIB 11-15(R)/11-17(R) PL 36 - Ihle Direct at 9:18 to 10:15.

10. Analyses of the Midwest Greenhouse Gas Reduction Accord have also showed projected losses in gross regional product and jobs. EIB 11-15(R)/11-17(R) PL 36 - Ihle Direct at 10:16 to 11:9.

11. Not only will the price of electricity increase, the cap and trade rules will result in the loss of New Mexico jobs. Dr. Anne Smith, an expert economist, testified based on her economic analysis, that job losses will increase over time due to the adverse impact of Part 350. For example, she testifies that, in 2020 her model projects "between 649 and 1,736 fewer jobs in New Mexico, compared to the number of jobs that would be here if Rule 350 were to be repealed . . . before it's slated to start in 2013." EIB 11-15(R)/11-17(R) Tr. 190:1-5 (Smith). Ten years later the job losses are much greater: "In 2030, the projected job reduction is projected to be between 1,167 and 2,530 if the rule is implemented." EIB 11-15(R)/11-17(R) PL 39 - A. Smith Direct at 7:7-10. Two counties in northwestern New Mexico will suffer the greatest job losses. *Id.*

12. Compelling evidence provided that climate change will not be affected by a single state or a few states capping greenhouse gas emissions. The Board finds that the theoretical, regional reduction in greenhouse gas emissions that is the goal of Part 350, even if it were not lost to leakage, is inconsequential compared to national or global greenhouse gas emissions.

13. The term "emissions leakage" refers to the concept that even if a rule is intended to reduce emissions in a certain geographic area, the rule may result in simply moving the sources of those emissions outside the geographic area so that any reductions that take place within the jurisdiction of the rule are displaced or offset by emissions increases outside the jurisdiction of the rule. EIB 11-15(R)/11-17(R) PL 36 - Bothwell Direct at 14:17 to 15:4; EIB 11-15(R)/11-17(R) PL 39 - A. Smith Direct at 25:2-15; EIB 11-15(R)/11-17(R) Tr. 422:10 to 426:19 (Holmstead); EIB 11-15(R)/11-17(R) PL 36 - Forrister Direct at 8:12-14.

14. Part 350 will result in emissions leakage because it will incentivize covered sources, particularly in the electric sector, to purchase less-expensive out-of-state electricity or in-state electricity that is not covered by the rule. EIB 11-15(R)/11-

17(R) PL 38 - Themig Direct at 18:7-9; EIB 11-15(R)/11-17(R) PL 36 - Bothwell Direct at 14:11-13; EIB 11-15(R)/11-17(R)Tr. 516: 10-14 (Themig).

15. Compelling testimony provided that Part 350 theoretically may result in reduced emissions within the jurisdiction of the Board, greenhouse gas emissions potentially will simply increase elsewhere, resulting in no net effect on global greenhouse gas emissions or on climate change. EIB 11-15(R)/11-17(R) PL 36 - Forrister Direct at 8:9 to 9:6; EIB 11-15(R)/11-17(R) PL 36 - Bothwell at 11:19 to 12:5; EIB 11-15(R)/11-17(R) PL 36 - Ihle Direct at 11:10 to 12:2; EIB 11-15(R)/11-17(R) Tr. 245:7-25 (Forrister); EIB 11-15(R)/11-17(R) Tr. 473:2 - 474: 12 (Gantner).

16. The risk of emissions "leakage" was highlighted in the testimony of several witnesses. Mr. Dirk Forrister, Principal and Founder of Forrister Advisory, witness on behalf of PNM, stated:

> . . . when New Mexico started down the road of the WCI, it was with a lot more fellow travelers than you have now, and a technology program would apply evenly across other -- you know, to states -- your bordering states, as opposed to a program that just has you and California in it and creates that leakage potential, because the leakage potential is what makes it a poor performer environmentally. Right? It creates the potential that you're paying the extra money, but the emissions are still going up in Arizona, so what did you accomplish?

EIB 11-15(R)/11-17(R) Tr. 245:9-19 (Forrister).

17. The Board also considered Mr. Sims when he stated:

> We have the ability to buy and sell power from a number of utilities -- Public Service Company of New Mexico, Arizona Public Service Company, a number of California and Arizona utilities who are participants in those coal-fired plants in the Northwest part of the state. That power doesn't necessarily have to come from those plants, but it could come from plants -- coal-fired plants in Arizona or Colorado.

EIB 11-15(R)/11-17(R) Tr. 258:13-2l (Sims). Mr. Sims also testified as follows:

> [W]e have state-of-the-art natural gas combined cycle generation; very, very efficient. Natural gas emits less greenhouse gases per megawatt than coal-fired generation. If we're required to reduce our output at our facilities X number of percent per year, and it is more economically feasible for us to

> buy coal-fired generation from a power plant in Arizona, what we have done is for every megawatt we have reduced with our very efficient natural gas-fired generation in New Mexico, we're now buying very inefficient, more greenhouse gas intensive generation from someone else, and we've actually increased the amount of greenhouse gas emissions going into the atmosphere.

EIB 11-15(R)/11-17(R) Tr. 263:12-25 (Sims).

18. Moreover, the Board carefully considered that Mr. Holmstead testified as follows:

> Traditionally, especially in Germany, there's been a lot of heavy industry, steel making, you know, foundries, other sorts of things. Because of their -- because of the emissions trading scheme increases the cost of energy to those -- those industries, they've said that they can no longer compete, and any new facilities they will build in areas that are not subject to the emissions trading scheme. And so the -- the theory is -- leakage means that you may -- you may think you're doing something in this area, but, in fact, all you're doing is causing those same emissions to occur someplace else.

EIB 11-15(R)/11-17(R) Tr. 422:16 to 423:2 (Holmstead).

19. The issue of leakage is of great concern to the Board. It creates the prospect of New Mexico sources and utilities moving to neighboring states, which would be an economic loss to New Mexico.

20. Part 350 does not adequately address the subject of leakage. Section 20.2.350.17 NMAC states that, prior to January 1, 2016, the NMED "shall evaluate and advise the board regarding amendments to the cap-and-trade program regarding . . . emissions leakage to areas outside of the cap-and-trade program." Thus, for approximately four years, the Rule has no provision to address the leakage issue. It is unclear that after 2016 the issue will be addressed in a satisfactory manner.

21. The testimonies of Ms. Barbara Walz, Mr. Darren Smith, Ms. Jennifer Knowlton, Mr. Douglas Price, Environmental Engineer, Navajo Refining Co., witness on behalf of NMOGA, and Dirk Forrister demonstrate that the cap and trade rules will put New Mexico at an economic disadvantage to neighboring states. *See e.g.* EIB 11-15(R)/11-17(R) PL36 - Forrister Direct at 14:14 to 15:7.

22. The testimonies of Bruce Gantner, Dr. Anne Smith, Patrick Themig, Timothy Sheesley, Roger Armstrong, General Manager, Twin Stars Ltd, witness on behalf of IPANM and Maude Grantham-Richards demonstrate that New Mexico businesses and state revenues will be negatively impacted by the cap and trade rules. *See e.g.* EIB 11-15(R)/11-17(R) PL37 – Armstrong Direct at 16.

23. The testimonies of Jack Ihle, Barbara Walz, Cynthia Bothwell, Patrick Themig, Michael Sims demonstrate that cap and trade rules will cost New Mexico residents a significant amount of money. *See e.g.* EIB 11-15(R)/11-17(R) PL 36 - Bothwell Direct at 7:21 to 8:12.

24. In summary, the Board concludes that the benefits of Part 350 do not outweigh the costs.

25. Likewise, the public was overwhelming in support of repealing Parts 300, 301 and 350. The Board received over 35,000 letters, comments and petitions in the 2011 proceedings, with the majority (approximately 98%) opposed to Rules 300, 301 and 350 (cap and trade). This compares to approximately 2500 letters, comments and petitions received by the Board in the 2010 proceedings, with the majority (approximately 87%) opposed to Parts 300, 301 and 350. This public comment demonstrates that cap and trade has grown increasingly out of favor with the public during the past 15 months since the Board adopted Parts 300, 301 and 350.

(3) TECHNICAL PRACTICABILITY AND ECONOMIC REASONABLENESS OF REDUCING OR ELIMINATING AIR CONTAMINANTS FROM THE SOURCES INVOLVED AND PREVIOUS EXPERIENCE WITH EQUIPMENT AND METHODS AVAILABLE TO CONTROL THE AIR CONTAMINANTS INVOLVED.

NMSA § 74-2-5(E)(3) requires that the Board consider the "technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved." The Board makes the following findings:

A. Economic Harm Resulting from Part 350.

1. While Part 350 will achieve no environmental or climate change benefit, it will inflict significant economic harm on the already fragile New Mexico economy, in the form of higher electricity rates, lost income, lost jobs and lost revenue to local government. PNM has projected a system cost penalty to PNM customers of $841 million (2011 net present value) from the Rule's emissions reductions over a time period from 2012 to 2030. EIB 11-15(R)/11-17(R) PL36 - Bothwell Direct at 7:20-8:1.

2. Compelling evidence showed that because no commercially viable control technologies currently exist for reducing GHG emissions to existing electric utility generating sources, PNM will be compelled by the Rule to rely on higher-cost generating resources, including sources outside the NMED's jurisdiction. EIB 11-15(R)/11-17(R) PL36 - Bothwell Direct at at 5:6-14, 13:19-22.

3. In terms of overall economic damage, estimates range from a low of $132 million in lost gross state product with a loss of 408 jobs as the result of the Rule, to $2.1 billion in lost gross state product with a loss of 15, 720 jobs. EIB 11-15(R)/11-17(R) PL36 - Sheesley Direct at 9:6-8. The state's low income population will be hit inequitably hard. EIB 11-15(R)/11-17(R) PL36 - Sheesley Direct at 13:1-2.

4. The Department's ability to implement the regulations in also a concern for the Board. According to Mr. Richard Goodyear, acting Chief of the Environment Department's Air Quality Bureau, witness on behalf of NMED, the impact to his Bureau will be substantial, to the likely detriment of other air quality program. On page 12 of his 11-15/17 direct testimony, Mr. Goodyear said, "I have determined the Department never developed an estimate of the resources needed to implement Part 350, either as part of the Department's overall planning or as evidence in support of its petition for the adoption of Part 350."

5. Although Ms. Mary Uhl, Air Quality Bureau Chief, witness on behalf of NMED testified on the subject in EIB 10-04(R) Tr. 912 - 913, 925 – 927, she was unable to provide specificity.

6. In EIB 11-15(R)/11-17(R), Mr. Goodyear provided details on that financial impact to the Department with specific dollar amounts. On page 14 of his direct testimony, he stated:

> The cap and trade rule, Part 350, would require 2 [full time employees] to administer the program. Assuming each of those additional [full time employees] would be assigned an Environmental Scientist and Specialist classification, each of these 5.5 positions would require about $68,000 [annually] in salary, benefits, and administrative overhead, for a total of 374,000 in annual budget. Additionally, the 1.5 [full time employee] worth of work extracted from existing staff to support work . . . would cost at least another 102,000.

7. The Board finds that the cost of Part 350 to the Bureau to be compelling; the Board concludes that it should not adopt a regulatory program in which the Bureau has neither the money nor manpower to implement.

8. As noted even more fully by the Board in Section 2 above, the projected loss of jobs, the loss of business, the issue of leakage, and the additional impacts of the economy on New Mexico all lead to the conclusion that Part 350 is too burdensome on New Mexico.

B. Part 350 is Technically Impracticable.

1. Several witnesses from the affected industries testified in both the 2010 and 2011 proceeding regarding the lack of technically practicable, cost-effective options for achieving the required reductions in particular industries and sectors and at individual facilities in New Mexico. EIB 11-15(R)/11-17(R) PL41 – Gantner Direct at 28:15 to 29:5; EIB 10-04(R) PL35 – Gantner Direct at 3:13-17; EIB 11-15(R)/11-17(R) PL41 D. Smith Direct at 8:10 to 12:10; EIB 11-15(R)/11-17(R) PL41 – Price Direct at 7:5-6.

2. These witnesses also discussed the reduction strategies and technologies that are already being utilized at New Mexico facilities, and the reality that many of the options for reducing GHG emissions have already been largely exhausted, leaving little possibility for further reductions that are technically practicable, cost-effective, and do

not require reducing production or shutting down operations. *See e.g.* EIB 11-15(R)/11-17(R) PL41 – D. Smith Direct at 2:14-21, 9:11-12.

3. The Board considered the testimony of Mr. Holmstead compelling when he stated that "[t]here is no technology like there is for SO_2, where you can bolt on a -- well, you can build a scrubber, or you can build a selective catalytic reduction unit, or you can put on a baghouse. There's nothing that can be added to an existing plant to – to reduce -- to reduce CO_2 emissions." EIB 11-15(R)/11-17(R) Tr. 428:9-14 (Holmstead).

4. He further explained, "And so the idea of using cap and trade for CO_2 is just a very different model. It's not about an efficient way of getting technology controls on it. It's a way to force people to use less electricity, to use less energy overall and to use it more efficiently, and over time then to move away from fossil fuels towards other fuels." EIB 11-15(R)/11-17(R) Tr. 431:5-11 (Holmstead).

5. To summarize this testimony and other testimony from witnesses such as Mr. Michael Sims, there are no commercially available technologies to reduce significant amounts of carbon dioxide from fossil fuel-fired power stations. There is no technology that removes carbon dioxide from stack emissions. Because the technology does not exist, the only way to reduce greenhouse gas emissions is to reduce the amount of fuel burned. EIB 11-15(R)/11-17(R) PL38 – Sims Direct at 11-12; EIB 11-15(R)/11-17(R) Tr. 269:3-12 (Sims).

6. For electric utilities that use state-of-the-art gas-fired power plants, Mr. Sims stated that technology does not exist to further increase efficiency to reduce greenhouse gas emissions two percent each year as required by Part 350. EIB 11-15(R)/11-17(R) PL38 – Sims Direct at 9-10.

7. Therefore, the Board finds that Part 350 penalizes utilities that generate electricity with natural gas because they cannot integrate a less carbon-intensive fuel and have few options other than reducing output and purchasing allowances or offsets. Utilities can also purchase reduce lower-emitting gas-fired output and replace it with higher-emitting purchased power generated by out-of-state coal plants or other plants

not subject to Part 350. But as described previously, this "leakage" problem would likely increase net greenhouse gas emissions.

C. Part 350 is Not Economically Reasonable

1. The Board concludes that even if electric utilities choose to reduce output in order to comply with the rule, they (and their customers) may still be forced to bear the costs of complying with the terms of long-term prepayment or take-or-pay gas and coal contracts.

2. There was testimony in the 2010 hearing from Dr. Ranajit Sahu, Independent Consultant on Energy and Environmental Issues, witness on behalf of NMED, that electric utilities could reduce GHG emissions by managing energy demand, reducing transmission and distribution losses, reducing electricity loss at generating stations, improving fuel conversion efficiency, using lower carbon intensity fuels, deploying optimization technologies, developing carbon capture and storage projects, and integrating renewable energy supplies to reduce system-wide carbon intensity. EIB 10-04(R) PL18 – Sahu Direct at 4:16 to 8:10.

3. The Board finds, however, that Mr. Sims convincingly testified that these options "cannot be economically implemented and in some cases are not yet technologically feasible on a utility scale." EIB 11-15(R)/11-17(R) PL38 – Sims Direct at 9.

4. Based on compelling evidence, the Board further finds the follow facts demonstrate the current status of renewable energy in New Mexico:

a. Besides its present hydroelectric generation, other renewable energy is not either feasible or cost effective for the City of Farmington.
b. Solar, wind, geothermal and biomass are not feasible, workable or cost-effective at this time.
c. Neither wind nor geothermal are sources in the City of Farmington's area.
d. Biomass does not have a sufficient source from agricultural waste except to construct a very small facility.

e. Solar is not cost-effective at $6,500/kilowatt versus $1,200/kilowatt for the City of Farmington's natural gas combined cycle plant.

f. Solar power is not capable of storage on a commercial scale, which also disqualifies it as a feasible, reliable source.

g. Solar would require backup generation for the hours of the day or days the sun does not shine or for variability. Such back-up generation would increase fuel, operation and maintenance costs and would increase emissions on a per kilowatt-hour basis from cycling.

5. Even more problematic for the Board is that there was no substantial evidence provided at the hearing regarding the availability of allowances for purchase on the market.

6. Other witnesses testified that the number of allowances on the market, and thus the price of allowances, would be dependent on which jurisdiction were participating in the regional cap and trade program and whether those jurisdictions were net purchasers or net sellers of allowances.

7. Evidence regarding the availability of allowances was a critical component for this Board to consider when determining the practicability of implementing a cap and trade program in a state that would be a net purchaser of allowances.

8. Mr. Tongate's testimony was compelling for the Board when he stated:

> The reality of a robust multi-jurisdiction regional trading program has proven to be much more ephemeral than the Environment Department envisioned when it originally petitioned the EIB to adopt the cap and trade rule more than three years ago. Of the seven states that originally agreed to participate in the WCI trading program, Utah, Montana, Arizona, Oregon and Washington now have withdrawn. Today, only New Mexico and California of the original WCI states still seek to establish cap and trade program.

EIB 11-15(R)/11-17(R) PL35 - Tongate Direct at 6:15-20.

9. The Board notes that this is a significant change from the description of Mr. Jim Norton, Director of the Department's Environmental Protection Division, of an active regional trading program that would be in place. He stated on page 7 of his direct

testimony in EIB 10-04(R), "The Partner jurisdictions in the WCI has grown and now includes the five original states, [and] the states of Utah and Montana, and provinces of British Columbia, Manitoba, Ontario, and Quebec." He also discussed the goals of the WCI wherein each of those states had agreed to do is to reduce emissions below 2005 levels by 2020, by adopting economy-wide regional Greenhouse Gas Reduction Program. The Board finds that very little of what Mr. Norton testified to has come to fruition.

10. Dr. Anne E. Smith in EIB 11-15(R)/11-17(R) shed additional light on what the costs to New Mexico in a two-state system would be, unlike the multistate system that was alluded to in EIB 10-04(R). EIB 11-15(R)/11-17(R) Tr. 187:19 to 188:20.

11. Mr. Jim Norton had stated on page 1181 of the transcript in the EIB 10-04(R) proceeding that the Department believed that cap and trade is the most cost effective way to result in emission reductions from the largest source of pollution in New Mexico and that the beauty of cap and trade is the market can find a lower cost way to reduce emissions. That assumption was based on a multistate trading program.

12. Contrasting Mr. Norton's vision with the reality today of only having California to trade with, Dr. Smith presented Figures 8 and 9, that were titled Summary of Emissions and Allowance Imports and Exports under Part 350.

13. Dr. Smith used a higher allowance and a lower price allowance. Using those two bounding sets, she calculated that the negative impact to the New Mexico GDP is between 828 million and 1.6 billion dollars which would be a serious economic impact for the citizens of New Mexico. EIB 11-15(R)/11-17(R) PL38 A. Smith Direct at 36:18 to 37:1.

14. In EIB 10-04(R), Dr. Rose, Research Professor in the School of Policy, Planning and Development at the University of Southern California, witness on behalf of NMED, made some assumptions in his analysis on complementary policies that are outside the scope of this Board and outside the scope of New Mexico. He stated on page 2 of his direct testimony: "We estimate employment impacts of the proposed policies to be rather small, ranging from a gain in the year 2020 of 2,500 jobs in the case of full implementation of complementary policies, to a loss of 3,100 jobs in a case

where the complementary policies are implemented at only half of their potential effectiveness." He did not do an analysis of what happens if those complementary policies are not enacted at all. Nevertheless, it is clear that his analysis shows that the trend would be more and more significant negative impact.

15. The Board concluded that Dr. Smith in EIB 11-15(R)/11-17(R) focused solely on the rules before the Board, and it reflects a significant negative economic impact to the State of New Mexico.

16. Based on this evidence and these reasons, the Board concludes that Part 350 is technically impracticable and economically unreasonable for the State of New Mexico.

CHANGE OF POSITION

The Board does acknowledge that repeal of Part 350 constitutes a reversal within a relatively short period of time. The findings set forth herein demonstrate that the Board has considered the factual findings of the 2010 proceeding, and the Board has provided a reasoned explanation, with support from the record, for the reasons for its change in position.

A. NEW SUBSTANTIAL EVIDENCE OF MATERIAL CHANGES SINCE THE ADOPTION OF PART 350.

While the Board is not required to show a change in circumstances for its decision to repeal Part 350, substantial evidence was presented of material changes since the adoption of Part 350 in November 2010. *See Motor Vehicle Manufacturers Association v. State Farm*, 463 US 29, 57 (1983) (agencies may change its course "either with or without a change in circumstances.").

Of significance during the fifteen months since adoption of Part 350, were new material changes. Substantial evidence was presented during the 2011 proceedings regarding these material changes. Certain assumptions that the Board relied upon in 2010 to vote in favor of the rule are no longer valid. Moreover, new evidence was presented to the Board in 2011 (including evidence that was not and could not have

been made available to the Board in 2010).

The Board finds the following material changes relevant, with substantial evidence presented to support repeal of Part 350:

1. NMED originally petitioned for Part 350 but now supports repeal;
2. The Western Climate Initiative is disintegrating;
3. Cap and trade is now out of favor at the federal, regional and international levels;
4. Other programs to reduce greenhouse gas emissions have been implemented or are being implemented at the Federal level; and
5. An updated economic analysis done in 2011, based on the material changes that have occurred, indicates substantial negative impacts to the State of New Mexico.

1. NMED Originally Proposed the Rule and Now Supports Repeal; Disintegration of the Western Climate Initiative

There was substantial evidence presented that there have been significant changes to the Western Climate Initiative since Part 350 was passed, and therefore the primary assumptions for adopting Party 350 are no longer valid.

A. Testimony from NMED

NMED, who originally proposed this rule, is no longer a proponent of Part 350 and has valid reasons for supporting repeal of the Rule. This is a very substantial change. In large part, NMED's change in position is based on the disintegration of the Western Climate Initiative.

New Mexico, along with California, Washington, Oregon and Arizona, originally joined the Western Climate Initiative ("WCI"). The WCI later expanded to include Utah and Montana, and the Canadian provinces of British Columbia, Manitoba, Ontario and Quebec. While WCI was originally formed to "reduce GHG emissions and spur investment in clean-energy technologies," the organization's primary focus and most notable achievement was its Design Recommendations for the WCI Regional Cap-and-

Trade Program. EIB 10-04(R) PL18 – Norton Direct at 7:20-21. In fact, the Rules ultimately adopted by the EIB were patterned after the WCI's Design Recommendations. EIB 10-04(R) PL18 – Norton Direct at 9:8-9.

However, since the adoption of Part 350, most of the States who had wanted to participate in the WCI trading program dropped out and never adopted a cap and trade program. Only California and New Mexico have promulgated greenhouse gas cap and trade regulations. EIB 11-15(R)/11-17(R) Tr. 92:19-20 (Tongate).

This is a major change from Director Jim Norton's (NMED) description in 2010 of an active regional trading program that would be in place. In his direct testimony in 10-04(R), he states:

> The Partner jurisdictions in the WCI has grown and now includes the five original states, the states of Utah and Montana, and the provinces of British Colombia, Manitoba, Ontario and Quebec. Several additional U.S. and Mexican states and Canadian provinces have joined as official observers. This economically and culturally diverse group of jurisdictions understands the need for immediate and coordinated action to reduce GHG emissions. WCI's objectives include:
> • Establishing a regional goal of reducing emissions by 15 percent below 2005 levels by 2020;
> • Establishing a regional market-based emissions reduction program covering a significant part of the regional economy; and
> • Participating in a multi-state OHO registry that tracks and manages emission reductions. Additionally, each member of the WCI, including New Mexico, is committed to reducing GHG emissions by: Adopting an economy-wide GHG reduction goal that is consistent with the overall regional goal; Developing a comprehensive multi-sector climate change action plan to achieve that goal.

EIB 10-04(R) PL18 – Norton Direct at 7:20 to 8:17.

During the 2011 proceedings, Mr. Tongate testified:

> [T]he reality of a robust multi-jurisdictional regional trading program has proven to be much more ephemeral than the Environment Department envisioned when it originally petitioned the EIB to adopt the cap and trade rule more than three years ago. Of the seven states that originally agreed to participate in the WCI trading

> program, Utah, Montana, Arizona, Oregon and Washington have now withdrawn. Today, only New Mexico and California of the original WCI states still seek to establish a cap and trade program, and California's program is currently bogged down in litigation.

EIB 11-15(R)/11-17(R) PL35 - Tongate Direct at 6:13-21.

Mr. Tongate further testified:

> the previous administration relied on the existence of the Western Climate Initiative in forming a regional cap-and-trade program that would have a significant impact on greenhouse gas emissions, and since five of the seven states that were involved have not adopted greenhouse gas regulations, that leaves it to just two states to try to impact global warming with their own cap-and-trade programs...

EIB 11-15(R)/11-17(R) Tr. 92:15-24 (Tongate).

Given the reality of only two states adopting regulations required by the WCI to participate in the western regional cap and trade program, the assumptions that prompted the previous administration simply do not exist. EIB 11-15(R)/11-17(R) Tr. 92:15-24 (Tongate). The original concept of a robust western regional cap and trade system — the vision that in no small measure caused the Department to petition the Board for adoption of Rules 350, 300, and 301 — does not, and will not, exist. EIB 11-15(R)/11-17(R) PL35 – Tongate at 6:15-17.

In addition, Part 350 would have placed a considerable burden on the Department as well. As of November of 2011, the Department indicated it did not have the necessary staff to implement the cap and trade regulations. EIB 11-15 Tr. 138 ll. 16-17.

B. Other Testimony Regarding Disintegration of Western Climate Initiative

Other witnesses testified during the 2011 proceedings how the Western Climate Initiative has disintegrated and how this impacts New Mexico.

Mr. Holmstead explained in his direct testimony:

> Of the 8 U.S. partners in WCI, only New Mexico and California are moving forward with a cap-and-trade program (and on a slower timetable than initially planned). In Canada, only Quebec

is scheduled to implement its program along with California's.

EIB 11-15(R)/11-17(R) PL39 - Holmstead Direct at page 2:18-20.

Mr. Forrister explained in his direct testimony:

> Assuming the California program goes forward - and that it is recognized under Part 350, Subparts 206 and 207 - there are serious concerns about how the market could work for covered entities in New Mexico. The combined California-New Mexico program would cover a greater number of sources, making it a more robust trading system than a single-state program. But it still suffers from the major drawback that none of the other states in the region are participating. California will have a much larger market. This situation is likely to create a market dynamic where New Mexico's companies compete with much larger, potentially better informed entities in California. Market prices would likely bear a stronger relationship to control costs and energy trends in California than in New Mexico. As a result, companies in California would likely understand these dynamics better than their counterparts in New Mexico, putting New Mexico companies at a competitive disadvantage. This situation presents a challenge for companies in New Mexico that is not faced by peers in neighboring states - and it could potentially increase their cost structures in comparison to competitors in adjoining states.

EIB 11-15(R)/11-17(R) PL36 - Forrister Direct at 14:14 to 15:7.

In his direct testimony, Mr. Ihle explained:

> ... policy developments over the last year demonstrate that California dominates the Western Climate Initiative ("WCI"), the regional GHG cap and trade program that New Mexico would join under Part 350. The WCI was originally expected to encompass several western US states, but will now only include the US states of California and New Mexico if Part 350 remains in place. California's policy choices will largely determine the carbon price, leaving the much smaller New Mexico economy exposed to the carbon price effects.

EIB 11-15(R)/11-17(R) PL36 - Ihle Direct at 4:3-10.

Notwithstanding the move away from cap and trade by other jurisdictions, what was expected to be a broad base of western state resources for New Mexico to address

reductions and offsets and allowances, creating a vibrant trading market, has dwindled to just two states with no prospects for that changing. This is a significant change from 2010 when the rules were adopted.

Based on this testimony, and other substantial evidence in the record, a cap and trade program, particularly based on only a two-state trading program under the Western Climate Initiative, is no longer useful for New Mexico.

2. Cap and Trade is Out of Favor at the Federal, Regional and International Levels.

There was substantial evidence in the record that, since Part 350 was adopted in 2010, cap and trade is now out of favor at the federal, regional and international levels.

In his direct testimony, Mr. Holmstead stated:

> On a regional level the Western Climate Initiative (WCI) has turned its focus away from an integrated cap-and-trade program, and it appears that the Regional Greenhouse Gas Initiative (RGGI) may soon begin to disband. Of the 8 U.S. partners in WCI, only New Mexico and California are moving forward with a cap-and-trade program (and on a slower timetable than initially planned). In Canada, only Quebec is scheduled to implement its program along with California's. Senior officials in three of the ten states in RGGI are seeking to remove their states from RGGI, and New Jersey has already taken steps to leave the program. I have not seen anything to suggest that the announced Midwest Greenhouse Gas Reduction Accord is moving forward, and according to a February 2011 news article, it has been "effectively abandoned." Internationally, even the strongest proponents of the Kyoto Protocol and European Union's Emissions Trading Scheme (ETS) are reconsidering whether these programs should be continued.
>
> ...
>
> Since the New Mexico cap-and-trade rule was adopted in late 2010, no GHG cap-and-trade bill has been seriously debated in the U.S. Congress. As far as I know, no such bill has even been introduced since that time. When the New Mexico rule was proposed in the summer of 2010, the U.S. House of Representatives had passed the comprehensive Waxman-Markey bill, and the Senate was still considering its own somewhat less stringent cap-and-trade bill, generally referred to

> as the Kerry-Lieberman bill. As 2010 wore on, however, it became clear that the Senate would not pass Kerry-Lieberman or any other cap-and-trade bill. Despite the claims made by its proponents, many Senators came to believe that it would impose a substantial burden on the economy and substantially increase the cost of energy to their constituents, but would not have a meaningful impact on climate change. One of the proponents of these bills, Interior Secretary Ken Salazar, publicly acknowledged that "the term 'cap and trade' is not in the lexicon anymore. Even President Obama, who championed the idea of a cap-and-trade bill during his campaign, has stopped mentioning it in his public appearances. I am not aware of anyone who believes that this Congress will pass a cap-and-trade bill to address climate change. Nor do I believe that such a bill is likely to pass in the foreseeable future.

EIB 11-15(R)/11-17(R) PL 39 - Holmstead at 2:16-26; 3:7-21.

Mr. Holmstead further stated:

> When President Obama was elected, there was -- there were a number of people who believed that it was only a matter of time before there would be an international climate regime, that there would be a cap and trade approach for dealing with CO_2 emissions, and that as part of that international effort the US Congress would adopt something like these bills that you've probably heard of, the Waxman-Markey bill...It's become apparent, though, that that's much more difficult than many people were suggesting, and much more costly, and that the whole world is very much intertwined.

EIB 11-15(R)/11-17(R) Tr. 381:4-24 (Holmstead).

He also stated: ". . .two years ago there was a sense that the whole world was moving this direction. There now is not that momentum, and certainly not in the United States Congress." EIB 11-15(R)/11-17(R) Tr. 387:21-24 (Holmstead)

Based on this testimony, there is substantial evidence in the record to show that cap and trade is no longer a favored solution for New Mexico to reduce greenhouse gas emissions.

3. Other Programs to Reduce Greenhouse Gas Emissions are Being Implemented instead of Cap and Trade.

There was substantial evidence presented by several witnesses in the 2011 proceedings that the EPA has enacted statutes and adopted rules which are intended to reduce greenhouse gas emissions, some of which are new since 2010.

Mr. Holmstead stated:

> . . . since the Board promulgated Part 350, EPA has continued to propose, adopt, implement, and enforce mandatory regulations to reduce greenhouse gas emissions . . . EPA began to regulate GHG emissions from stationary sources on January 2, 2011. As of that date, the Clean Air Act's Prevention of Significant Deterioration (PSD) program for greenhouse gas emissions took effect for all stationary sources that were already required to obtain PSD permits for their non-GHG emissions. On July 1, 2011, the PSD program for GHGs took effect for all major stationary sources. The PSD program requires that major new or modified stationary sources of covered emissions obtain a permit that determines maximum pollutant levels that may be emitted by the source. Under this program, any company that wants to build a new major source or modify an existing major source must obtain a permit to ensure that they will use the "best available control technology" (BAC1) to minimize emissions of GHGs and other regulated pollutants.
>
> ...
>
> In particular, the EPA began regulating stationary sources on January 2, 2011 under the Prevention of Significant Deterioration (PSD) program; established new source performance standards (NSPS) for electric generating units and petroleum refineries; and together with the National Highway Traffic Safety Administration, announced proposals to adopt more stringent standards to limit greenhouse gas emissions from model year 2017-2025 passenger cars, light-duty trucks, and medium- and heavy-duty vehicles.

EIB 11-15(R)/11-17(R) PL 39 - Holmstead at 3:24-34, 4:11-13.

Mr. Holmstead noted: "...because of the Supreme Court's decision in *Massachusetts v. EPA*, EPA is actually going forward with a number of regulatory actions that will, to the extent possible with current technology, result in at least some reductions of greenhouse gases." EIB 11-15(R)/11-17(R) Tr. 390:7-11 (Holmstead)

Mr. Holmstead further stated:

> . . .somewhere between 35 and 40 percent of all greenhouse gas emissions in the United States come from the transportation sector. EPA is regulating light duty vehicles, heavy duty vehicles, medium duty vehicles, all of those...from cars to trucks to buses to...almost any kind of engine is already regulated for CO_2 emissions.

EIB 11-15(R)/11-17(R) Tr. 390:25 to 391:6 (Holmstead).

Mr. Holmstead also stated that "EPA has established the Prevention of Significant Deterioration program, which regulates between 70 to 80 percent of [stationary sources]." EIB 11-15(R)/11-17(R) Tr. 391:24 to 392:3 (Holmstead).

Mr. Holmstead further stated:

> ...in addition to having roughly 70 to 80 percent of the greenhouse gas emissions from stationary sources covered by this PSD program, you have ... New Source Performance Standards . . . And, so EPA is very much moving forward to regulate greenhouse gas emissions under the Clean Air Act.

EIB 11-15(R)/11-17(R) Tr. 393:3-12 (Holmstead).

Mr. Holmstead further testified:

> On December 23, 2010, EPA entered into two proposed settlement agreements with environmental groups and several cities and states, including New Mexico, to establish new source performance standards (NSPS) for electric generating units (EGUs) and petroleum refineries. These settlement agreements were finalized, after an opportunity for notice and comment, on March 2, 2011. Section 111 of the Clean Air Act authorizes EPA to establish new source performance standards on an industry-by-industry basis. Despite the fact that the name refers to "new sources," NSPS can also be applied to existing units under certain circumstances. Under section 111(d), EPA must require states to submit plans that establish NSPS "for any existing source for any air pollutant (I) for which air quality criteria have not been issued or which is not included on a list published under section [108(a) of the Clean Air Act] or emitted from a source category which is regulated under section [112 of the Clean Air Act] but (ii) to which a standard of performance under this section would apply if such existing source were a

> new source." Because GHG emissions meet the requirements of section 111(d), EPA is authorized to regulate GHG emissions from existing sources. NSPS may include technology specifications, operational standards, and measurement requirements. The NSPS provisions focus on particular types of sources. Once the "source category" has been identified, the performance standards for the category must 'reflect the degree of emission limitation achievable through the application of the best system of emission reduction' that has been "adequately demonstrated" for that source category. In the EGU settlement, EPA agreed to issue final NSPS rule to address greenhouse gas emissions from EGUs by May 2012. Under the settlement, EPA agreed that the rule will include GHG requirements for both new and existing EGUs. With regard to GHG emissions from petroleum refineries, EPA agreed to issue final NSPS for new petroleum refineries and final greenhouse gas emission guidelines for existing petroleum refineries by November 2012. EPA notes that "these two industrial sectors make up nearly 40 percent of the nation's greenhouse gas emissions."

EIB 11-15(R)/11-17(R) PL39 - Holmstead Direct at 4:15 to 5:3.

Mr. Ihle testified: "First, the EPA now regulates U.S. power plant GHG emissions, and Part 350 would merely add another layer of GHG regulation." EIB 11-15(R)/11-17(R) PL36 - Ihle Direct at 3:15-16. "As of January 2, 2011, the EPA subjects new and modified power plants to New Source Review [("NSR")] for GHG emissions." EIB 11-15(R)/11-17(R) PL36 – Ihle Direct at 17:20-21. These new and modified power plants must go through a technology-based, source by source (known as "New Source Review") to demonstrate that they will use Best Available Control Technology ("BACT") to control GHG emissions. EIB 11-15(R)/11-17(R) PL36 – Ihle Direct at 17:21-18:4; EIB 11-15(R)/11-17(R) Tr. 496:10-14 (Ihle). "The New Source Review process is an open and public process conducted by states and incorporating stakeholder input to enforce federal law. The New Search Review process also becomes more stringent over time as new, lower-emitting technologies become available." EIB 11-15(R)/11-17(R) PL36 – Ihle Direct at 18. "Further, the EPA has agreed under Consent Orders to propose further GHG reduction rules for power plants and refineries. For example, the EPA has stated that it will propose GHC New Source Performance Standards ("NSPS") on September 30,

2011 and will finalize these NSPS rules on May 26, 2012." EIB 11-15(R)/11-17(R) PL36 – Ihle Direct at 18:9-12.

Mr. Ihle also talked about the Cross-State Air Pollution Rule. He testified that while it is not a greenhouse gas reduction rule, it will result in a large amount of greenhouse gas reductions. He testified that, under this Rule, greenhouse gas emissions could be reduced 250 million metric tons per year over the next five or ten years. EIB 11-15(R)/11-17(R) Tr. 498:22 to 499:23 (Ihle); EIB 11-15(R)/11-17(R) PL36 – Ihle Direct at 24:1-3.

Ms. Jennifer Knowlton, P.E., Environmental Engineer, Agave Energy Co., witness on behalf of NMOGA testified in 2011 about the federal leak detection and repair regulations for the oil and gas industry. These regulations are not specifically a greenhouse gas rule, but, as she noted, the EPA admits that these rules will reduce greenhouse gas emissions, and EPA estimates that those rules will reduce methane emissions by 3.4 million tons, which is equal to 65 million metric tons of carbon dioxide. EIB 11-15(R)/11-17(R) PL41 – Knowlton Direct at 14.

Ms. Knowlton also talked about the federal LDAR (Leak Detection Regulations) in the oil and gas industry to reduce greenhouse gas emissions. She stated:

> EPA has proposed New Source Performance Standards (NSPS) for the oil and gas industry. 40 CFR Part 60, Subpart 0000 (the Oil and Gas Rules) was published in the Federal Register on August 23, 2011 and will be finalized by February 28, 2012. Several of the emission sources that I have listed or described here are impacted. While the rule specifically targets VOC sources, EPA admits that these rules WILL reduce GHG emissions as well. In an associated fact sheet, EPA estimates these rules will reduce methane emissions by 3.4 million tons, which is equal to 65 million metric tons of carbon dioxide equivalent (CO_2e), a reduction of about 26 percent, industry-wide.

EIB 11-15(R)/11-17(R) PL41 - Knowlton Direct at 13:20 to 14:6.

NMED also recognized in the 2010 proceedings that the EPA might adopt regulations to reduce greenhouse gas emissions. Director Norton than stated, "it is likely that the federal government eventually will regulate [greenhouse gases]." EIB 10-

04(R) PL18 - Norton Direct at 14:12-13. He further testified during the 2010 proceedings that NMED supported an effective national program and proposed to sunset Part 350 if and when the federal government took action. He further testified in 2010, "If the federal government were to move forward, that would be a much larger source of emission reductions and would be more beneficial." EIB 10-04(R) Tr. 1237:24-1238:1 (Norton). This is very similar to Deputy Secretary Tongate's testimony in 2011 when he stated: "A strong federal policy not only could achieve greater emission reductions than state-led policy action alone, but also could provide for a level playing field for businesses." EIB 11-15(R)/11-17(R) PL35 – Tongate Direct at 6:4-5.

Thus, NMED policy is consistent between the 2010/2011 proceeding in that a federal approach would have greater environmental benefit, less economic impact, and would be preferable. While a federal cap and trade program was the desired approach in 2010, there was a recognition by NMED that the federal EPA could implement other effective regulations to reduce greenhouse gas emissions and that this Board could subsequently repeal or rescind Part 350.

In summary, the EPA has adopted and is initiating other greenhouse gas emissions reduction regulations, and related regulations which also have the effect of reducing greenhouse gas emissions. These regulations are different from cap-and-trade based programs. Some of these federal regulations are new since Part 350 was adopted.

4. 2011 Economic Analysis Demonstrated Significant Negative Impacts to New Mexico.

Dr. Anne Smith did an updated economic analysis of Part 350 during 2011 assuming only New Mexico and California participating in a cap and trade program, which differed from the 2010 analysis done by Rose and Hausker. She testified:

> I have done an analysis that reflects a realistic scope of the allowance market, given an updated understanding of the political realities, and that is a market mainly with California, as compared to Rose and Hausker assuming all 11 . . . original WCI jurisdictions trading simultaneously.

EIB 11-15(R)/11-17(R) Tr. 192:18-23 (Smith).

Dr. Smith testified, based on her economic analysis, that job losses in New Mexico will increase over time due to the adverse impact of Part 350. For example, in 2020, her model projects "between 649 and 1,736 fewer jobs in New Mexico, compared to the number of jobs that would be here if Rule 350 were to be repealed." EIB 11-15(R)/11-17(R) Tr. 190:1-3 (Smith). "In 2030, the projected job reduction is projected to be between 1,167 and 2,530 if the rule is implemented." EIB 11-15(R)/11-17(R) PL38 – A. Smith Direct at 7:7-8. Another witness, Mr. Darren Smith testified that this additional cost places a burden on the oil and gas industry that will result in reduced production, less expansion in New Mexico, reduced investment, lost jobs, and leakage. EIB 11-15(R)/11-17(R) PL 41 – D. Smith at 3:3 to 4:23, Exhibit A, 12:11 to 14:23.

While the California market alone does provide for the 100 million ton threshold listed in 20.2.350.14 NMAC, Dr. Anne E. Smith's testimony in 2011 proceedings sheds some light on the costs to New Mexico using a two-state system (unlike the multi-state system envisioned in the 10-04(R) proceedings). Director Jim Norton had testified in the 10-04(R) proceedings: "[T]he Department believes the cap and trade is the most cost-effective way to result in emission reductions from the largest sources of pollution in New Mexico, and in other places, as well. The beauty of cap and trade is that the market can find the lowest-cost way to reduce emissions." EIB 10-04(R) Tr. at 1181:10-15. We contrast that with the testimony in 11-15(R)/11-17(R), *see* Figures 8 and 9 from Dr. Anne E. Smith's "Summary of Emissions and Allowance Imports/Exports under Rule 350 using a Higher Allowance and a Lower Allowance Price Scenario" and the calculated result that New Mexico GDP would decline "$828 million to $1.6 billion." EIB 11-15(R)/11-17(R) PL38 - Smith Direct at 6:11.

Dr. Smith further testified:

> Although it is possible that New Mexico's linkage with California would alter these price projections by some degree, the effect is likely to be small compared to the range of price uncertainty already present, because New Mexico's cap is so small relative

to the AB32 cap, and its net supply to or demand from that linked allowance market will be even smaller.

EIB 11-15(R)/11-17(R) PL38 - Smith Direct at 23:1-4.

This, again, highlights the disparity between California and New Mexico as trading partners, which was not the focus of the 10-04(R) proceedings when numerous states were envisioned as being involved.

Dr. Rose's analysis in 10-04(R) made economic assumptions based on complementary polices to Part 350. EIB 10-04(R) PL18 - Rose Direct at 2:15-18. When these complimentary policies are removed from the analysis, the economic impact becomes increasingly negative. In contrast, Dr. Smith, in the 2011 proceedings, focused on Part 350, (the rule before this Board) and its economic impact. Her analysis shows a significant negative economic impact to the State of New Mexico.

In summary, the new economic analysis in the 2011 proceedings (based on a two-state cap and trade program – New Mexico and California) provided substantial evidence that the negative impacts to New Mexico would very serious and substantial. This is very different from the economic testimony in the 2010 proceedings which was based on numerous states participating in a cap and trade program as part of the Western Climate Initiative.

CONCLUSION

The Board voted to repeal Part 350 based on substantial evidence in the record for the following reasons:

1. Repeal will not cause injury to or interference with health, welfare, visibility and property.

2. Repeal will not harm the public interest.

3. Part 350 is not technically practical or economically reasonable to reduce or eliminate air contaminants.

4. There were material changes since the adoption of Part 350, as follows:

   a) NMED originally petitioned for Part 350 but now supports repeal;

   b) The Western Climate Initiative which was a key initiative in adoption of

Part 350 is disintegrating;

c) Cap and trade is now out of favor at the federal, regional and international levels;

d) Other programs to reduce greenhouse gas emissions have been implemented or are being implemented at the Federal level; and

e) An updated economic analysis done in 2011, based on the material changes that have occurred, indicates substantial negative impacts to the State of New Mexico.

ORDER

By a unanimous vote of 5 to 0, the Board voted to repeal Part 350. The repeal is effective thirty (30) days from the date of this Statement of Reasons (which completes the Board's repeal action pursuant to 20.1.1.406(E) NMAC and 20.1.1.406(F) NMAC and NMSA 1978, Section 74-2-6(F)).

Deborah Peacock, Chair
New Mexico Environmental Improvement Board

March 9, 2012
Date